Petition

81-548

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KOPPERS COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 17, 1981

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QUESTIONS PRESENTED

1. Whether judicially developed conclusive presumptions defining certain conduct as *per se* unreasonable under the antitrust laws may be used to withdraw the issue of reasonableness from juries in criminal antitrust cases in light of recent decisions of this Court invalidating the use of conclusive presumptions in criminal cases.

2. Whether, in a criminal antitrust case under Section 1 of the Sherman Act, it was error to instruct the jury that it need not consider the reasonableness of a customer and territorial allocation agreement between a supplier and its distributor.

PARTIES

Koppers Company, Inc. appeared as appellant before the United States Court of Appeals for the Second Circuit;* the United States of America appeared as appellee.

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* In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, Koppers Company, Inc. has no parent companies, subsidiaries or affiliates to report.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Koppers Company, Inc. ("Koppers"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered June 29, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reproduced in Appendix A and is reported at 652 F.2d 290. The challenged jury instructions of the United States District Court for the District of Connecticut are reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals of the Second Circuit was entered on June 29, 1981. On August 19, 1981, Justice Marshall granted petitioner an extension

of time until September 17, 1981 within which to file a petition for writ of certiorari. This petition was filed on September 17, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Constitutional provisions involved are the Fifth and Sixth Amendments which read, in pertinent part, as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . U.S. Const., V Amend.
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . U.S. Const., VI Amend.

The Statute involved is 15 U.S.C. § 1 which reads, in pertinent part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

Summary of the Proceedings Below

On July 24, 1979, an indictment was filed charging Koppers, a manufacturer and distributor of road tar, and Dosch-King Company, Inc. ("Dosch-King"), Koppers' sole distributor of road tar in the State of Connecticut, with unreasonably restraining interstate commerce in violation of Section 1 of the Sherman Act by conspiring to submit collusive bids and to allocate geographic areas for the sale and application of road tar in Connecticut.

Koppers pleaded not guilty. After a three-week trial, during which the government elected to seek a conviction only under the felony provisions of Section 1 of the Sherman Act,[1] the jury returned a verdict against Koppers. The district court imposed a fine of $400,000.

The Relationship Between Koppers and Dosch-King

During the period for which Koppers was convicted, the relationship between Koppers and Dosch-King was vertical. Since at least as early as 1973, Koppers was Dosch-King's sole supplier of road tar and, from 1974 to 1976, when it ceased to sell road tar, Koppers was the sole source of road tar sold in Connecticut. Koppers distributed road tar in Connecticut by means of a dual distribution system. Some tar was sold in bargeload lots from Koppers' Kearney, New Jersey plant to Dosch-King for resale and application to the state and towns. In addition, Koppers itself submitted bids to the state and towns, barged road tar to a rented storage facility in Portland, Connecticut and then subcontracted the actual hauling and application of the tar to other companies.

According to the government's evidence, Dosch-King was approached by a Koppers employee who proposed that, in submitting road tar bids to towns in Connecticut, Dosch-King use a formula based on Koppers' bidding formula. This resulted in Dosch-King being the low bidder in the western part of the state (the area it historically had served) and Koppers being the low bidder in the eastern part of the state (where its storage facility was located). For all practical purposes, the arrangement resulted in Dosch-King becoming Koppers' exclusive distributor for road tar in that portion of Connecti-

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[1] Effective December 21, 1974, a violation of Section 1 of the Sherman Act became punishable as a felony.

cut which it had traditionally served and which it was equipped to serve as a result of the location of its facilities.

Road tar manufactured and distributed by Koppers competes with asphalt. Both road tar and asphalt were used by towns in Connecticut for the maintenance of secondary roads; both were marketed and applied to the roads in essentially the same way; and both were included in the same state bidding procedure. Low bidders were selected for each town for both road tar and asphalt, and suppliers of the two products then competed for each town's contract. Thus, being selected as low road tar bidder did not assure any road tar sales.

The Rulings of the District Court

At trial Koppers contended that the challenged agreement between Koppers and Dosch-King was a reasonable allocation of territories between a supplier and a distributor. Accordingly, Koppers requested the district court to charge the jury that it must determine whether the alleged agreement between Koppers and Dosch-King unreasonably restrained interstate trade as charged in the indictment. Instead, the court instructed the jury that "[a]greements among competitors to rig bids *or* allocate customers are . . . *per se* unreasonable restraints of trade and illegal." (Emphasis added.) The court explained, "[t]his means that the mere doing of the act itself constitutes an unreasonable restraint on commerce and it is not necessary to consider why the acts were committed or what effect it had on the industry." The court also instructed the jury that:

> [I]f you find beyond a reasonable doubt that the defendant was a competitor of Dosch-King Company in the submission of bids to the State of Connecticut for road tar and became a party to the conspiracy charged in the indictment, then you do not have to

> decide whether such conspiracy was reasonable or unreasonable. . . .

In so charging the jury, the district court removed from the jury's consideration an essential element of the felony offense charged—whether Koppers' conduct constituted an unreasonable restraint of trade. Moreover, the court's charge precluded the jury from finding that the alleged agreement was a vertical allocation of customers between a manufacturer (Koppers) and its customer/distributor (Dosch-King) subject to the rule of reason. As noted above, there was substantial evidence from which the jury could have concluded that the arrangement between Koppers and Dosch-King was essentially a vertical territorial allocation and was a reasonable response to competition from asphalt distributors.

In sum, the district court's charge to the jury prevented the jury from considering the customer and supplier relationship between Koppers and Dosch-King, the interproduct competition between asphalt and road tar, and the functional equivalence of the challenged agreement to an exclusive distributorship.

The Decision of the Court of Appeals

Koppers appealed from the resulting judgment, contending, *inter alia*, that in a criminal antitrust case it is improper to remove the element of the reasonableness of the challenged conduct from the consideration of the jury by an instruction that such conduct is conclusively presumed to be unreasonable *per se*. Koppers also argued that, in any event, the court's instruction improperly defined the scope of existing *per se* rules and permitted the jury to convict Koppers based upon conduct that should have been subject to a rule of reason analysis.

The Court of Appeals rejected Koppers' first argument on the ground that it would effectively overrule this Court's opinion in *United States* v. *Socony-Vacuum Oil*

Co., 310 U.S. 150 (1940), which the Court of Appeals declined to do. The Court of Appeals rejected Koppers' second argument, finding that (1) the challenged conduct could only be considered as a horizontal agreement between competitors and not as a vertical allocation of territories because Koppers and Dosch-King both submitted bids to the state; (2) there was no evidence of justification for the challenged conduct; and (3) the horizontal nature of the agreement was fixed prior to 1973 when Koppers became Dosch-King's sole supplier.

REASONS FOR GRANTING THE WRIT

I. Review Is Necessary To Resolve An Important Conflict In Decisions Of This Court

This case presents the question whether this Court's decisions approving the use of judicially developed conclusive presumptions to define certain conduct as *per se* unreasonable under the antitrust laws may be used to withdraw the issue of reasonableness from a jury in a criminal case in light of recent decisions of this Court invalidating the use of conclusive presumptions in criminal cases.

This Court has held that certain conduct, such as price fixing, is *per se* unreasonable, and hence illegal under the Sherman Act, without inquiry into the actual reasonableness of that conduct in particular cases. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). The Court has held that no specific inquiry into the reasonableness of such conduct is required, not because the question of the reasonableness of that conduct is irrelevant or no longer an element of the offense charged, but because the Court has determined that such conduct may be *conclusively presumed* to be unreasonable. As stated in *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958):

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are *conclusively pre-*

> *sumed* to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. (Emphasis added.)

See also Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979) ("[C]ertain agreements or practices are so 'plainly anticompetitive' . . . and so often 'lack . . . any redeeming virtue' . . . that they are *conclusively presumed* illegal . . ." (emphasis added)); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 650 (1980) ("Since [the agreement] is merely one form of price fixing, and since price-fixing agreements have been adjudged to lack any 'redeeming virtue', it is *conclusively presumed* illegal. . . ." (emphasis added)).

On the other hand, this Court has held in a series of criminal cases decided subsequent to *Socony-Vacuum* that the Due Process Clause of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of *every* fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). Further, this Court has held that a court may not, through the use of conclusive presumptions, withdraw from the consideration of the jury any necessary element of the crime charged. *Morissette* v. *United States*, 342 U.S. 246, 275 (1952); *United States* v. *United States Gypsum Co.*, 438, 445 U.S. 422 (1978); *Sandstrom* v. *Montana*, 442 U.S. 510, 523 (1979). Thus, in a criminal case, a judge may not direct a verdict, in whole or in part, no matter how conclusive the evidence, since to do so would violate the defendant's right, implicit in the Sixth Amendment, to have the jury decide all relevant issues of fact. *United Brotherhood of Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408 (1947).

The opposing requirements of these two bodies of law are in direct and irreconcilable conflict in criminal anti-

trust cases involving conduct that falls within one of the judicially developed rules of *per se* illegality. In such cases, the use of a judicially developed conclusive presumption of unreasonableness conflicts with a defendant's Due Process right to have a jury consider an essential element of the offense charged.

Despite its apparent breadth, Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits only those contracts, combinations or conspiracies that unreasonably restrain trade. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 58-59 (1911); *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). Any other result would void the entire body of private contract law, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687-88 (1978), and would make the Sherman Act unconstitutionally broad. *Cf. United States* v. *Joint Traffic Ass'n*, 171 U.S. 505, 565-68 (1898).

Notwithstanding the basic "rule of reason" standard applicable to alleged violations of Section 1, courts have, over the years, identified certain categories of conduct which they have deemed to constitute unreasonable restraints of trade without regard to the actual effects—whether beneficial or harmful—of such conduct in individual cases. As Justice Marshall and others have recognized, these judicially crafted *per se* rules are simply an arbitrary administrative convenience justified on the assumption that "the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed in this degree, then they are simply not worth identifying in individual cases." *United States* v. *Container Corp. of America*, 393 U.S. 333, 341 (1969) (dissent).[2] As a result, de-

[2] *See also Tose* v. *First Pennsylvania Bank, N.A.* 648 F.2d 879, 881 (3d Cir. 1981) ("the *per se* doctrine is the law's recognition

spite the fact that the Sherman Act does not identify any specific conduct as an inherently unreasonable restraint of trade, a criminal defendant in cases involving conduct subject to *per se* rules is absolutely precluded from attempting to demonstrate that his own actual conduct does not, in fact, represent an unreasonable restraint of trade.

While the use of arbitrary rules of administrative convenience may well be suitable in civil cases and may have been consistent with the scope of Due Process protections when the *per se* rules were developed and first applied to criminal cases, it is no longer appropriate to use such rules in felony criminal cases today.

It has been over 40 years since this Court employed a *per se* rule of illegality in the context of a criminal antitrust case and then only in a bare majority opinion which did not address the precise question raised here. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Since Justice Douglas' opinion in *Socony*, the Supreme Court's examination of the *per se* doctrine has been limited to civil cases.[3] The Court has never considered whether the use of conclusive presumptions in a criminal antitrust case violates a defendant's due process right

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that probabilities abide in the laws of business and logic . . . [w]e are spared the need for elaboration, because the laws of economics persuasively predict how the balance will come out").

[3] *See, e.g., United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 1 (1956); *Northern Pac. Ry.* v. *United States*, 356 U.S. 1 (1958); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Broadcast Music, Inc.* v. *Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

to have a jury decide every necessary element of the offense charged, including the reasonableness of the challenged conduct.[4]

Since the Court's *Socony* decision, there have been significant changes in both the criminal and the antitrust laws. These changes have brought the conflict between the two bodies of law into sharp and immediate focus and require that they be harmonized:

1. In a series of decisions beginning in 1952 and culminating in 1979, the Court has repeatedly held that the Due Process Clause of the Constitution precludes the use of judicially developed conclusive presumptions which remove the determination of any necessary element of an offense from the consideration of the jury in a criminal case. *See Morissette*, *Gypsum* and *Sandstrom*, *supra*. At the time of *Socony* and its predecessors, however, conclusive presumptions were permitted in criminal cases. *See, e.g.*, *Cramer* v. *United States*, 325 U.S. 1, 31 (1945); *Tot* v. *United States*, 319 U.S. 467 (1943); *Agnew* v. *United States*, 165 U.S. 36, 50 (1897).

2. Since *Socony*, the Court has also explicitly recognized that *per se* antitrust rules are nothing more than judicially developed conclusive presumptions that certain types of conduct are, as a matter of fact, unreasonable without regard to their actual effect in individual cases. *See Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1 (1958); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980). Despite the fact that the application of *per se* rules to the *same* conduct may differ radically in a brief span of time,[5] *per se*

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[4] Even in *Socony*, the issue was simply the general appropriateness of any *per se* rule of illegality under the antitrust statutes.

[5] *Compare United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 315 (1967) (vertical territorial restrictions *per se* unreasonable) *with Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977) (vertical territorial restrictions not *per se* unreasonable).

rules continue to to be used by lower courts to resolve conclusively a necessary element of alleged criminal offenses under Section 1 of the Sherman Act.

3. Violations of the Sherman Act are now felonies rather than misdemeanors, punishable by up to three years imprisonment and by greatly increased fines.[6] The initial development and application of *per se* rules in criminal antitrust cases preceded these drastic increases in penalties[7] and occurred at a time when, as this Court recently recognized, "the [Sherman] Act ha[d] not been interpreted as if it were primarily a criminal statute." *United States* v. *United States Gypsum Co.*, 438 U.S. at 439. Recognizing these changes, and the fact that the Sherman Act is indeed a criminal statute, this Court recently held that intent "is an element of a criminal antitrust offense . . . which . . . cannot be taken from the trier of fact through reliance on a legal presumption. . . ." *Id.* at 435.

Certiorari should be granted in this case since only this Court can reconcile the conflict between its decisions concerning the scope of a criminal defendant's Due Process rights to a jury determination of every element of an offense and its decisions concerning the use of judicially developed conclusive presumptions of un-

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[6] A violation of the Sherman Act is now a felony punishable by a $1,000,000 fine for corporations, and a $100,000 fine and up to three years imprisonment for individuals. 15 U.S.C. § 1. Prior to the 1974 amendments, a violation was a misdemeanor punishable by a $50,000 fine for corporations, and a $50,000 fine and up to one year imprisonment for individuals. In 1940, at the time the *Socony* case was decided, it was a misdemeanor punishable by a $5,000 fine for corporations, and a $5,000 fine and up to one year imprisonment for individuals.

[7] *E.g.*, *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

reasonableness under the antitrust laws. Indeed, the Court of Appeals below specifically declined to follow this Court's opinions in *Morissette*, *Gypsum* and *Sandstrom* because to do so would effectively "overrule" the Court's opinion in *Socony*, which it declined to do.

Resolution of this conflict is both timely and necessary. Since a violation of the Sherman Act became a felony in 1974, enforcement of the Sherman Act through criminal actions has become increasingly vigorous. In the last three years alone, the United States has brought 86 felony antitrust actions against 423 defendants.[8] In that same period, there have been 429 felony convictions with 129 resulting in either imprisonment or probation.[9] Just recently, the Attorney General announced that the Administration intends to seek jail sentences for so-called *per se* violations of the Sherman Act.[10]

This Court should decide whether defendants alleged to have committed criminal violations of the antitrust laws are subject to different, and lesser, due process protections than defendants in any other criminal cases.

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[8] *See* 1980 Annual Report of the Director, Administrative Office of the United States Courts, Table D-2 at A-57; 1979 Annual Report of the Director, Administrative Office of the United States, Table D-2 at A-51; 1978 Annual Report of the Director, Administrative Office of the United States, Table D-2 at A-55.

[9] *See* 1980 Annual Report of the Director, Administrative Office of the United States Courts, Table D-5 at A-82, 83; 1979 Annual Report of the Director, Administrative Office of the United States Courts, Table D-5 at A-76, 77; 1978 Annual Report of the Director, Administrative Office of the United States Courts, Table D-5 at A-80, 81.

[10] William French Smith, Remarks before the District of Columbia Bar, June 24, 1981, reported at 5 Trade Regulation Reporter (CCH) ¶ 50,430.

II. Review Of The Judgment Of The Court Of Appeals Is Necessary To Correct An Erroneous Jury Instruction That Is In Conflict With The Decisions Of This Court And To Resolve A Conflict Among The Circuits

The district court's charge instructed the jury that any agreement to allocate territories between a supplier and a "competing" customer is a *per se* violation of Section 1 of the Sherman Act.[11] This charge precluded the jury from considering Koppers' theory of the case that the alleged agreement was, in fact, a vertical allocation of territories between a supplier, Koppers, and its customer, Dosch-King, which is subject to scrutiny under the rule of reason. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

1. Both the jury charge and the decision of the Court of Appeals are contrary to decisions of this Court which make clear that agreements between "competitors"—including agreements between a manufacturer and its distributor—to allocate territories are not, as a matter of law, always *per se* violations of the Sherman Act. Thus, for example, a supplier may allocate business between itself and its own "competing" customers just as Koppers and Dosch-King did here. *See, e.g., White Motor Co.* v. *United States*, 372 U.S. 253 (1963) (not unlawful *per se* for manufacturer to assign specific exclusive geographic territories to its dealers and prohibiting them from competing with accounts supplied directly by the manufacturer); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 369-72 (1967) (territorial restrictions imposed by manufacturers on distributors are vertical even though manufacturer also distributed directly to retailers). As a criminal defendant, Koppers was

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[11] The charge instructed the jury that all agreements to rig bids *or* allocate customers were presumed to be unreasonable.

entitled to have a correct instruction on the law of allocation of territories and to have the jury consider whether the agreement was a vertical one subject to the rule of reason, as Koppers contended, or a horizontal one, as the government contended.[12]

2. The Court of Appeals' opinion also creates a direct conflict between the Second Circuit and other circuits concerning the extent to which an agreement to allocate territories between a supplier and its competing customer must, as a matter of law, be characterized as a horizontal agreement among competitors and hence subject to a *per se* rule of illegality. The Court of Appeals held that the challenged conduct could only be considered as a horizontal agreement among competitors and not as a vertical allocation of territories because Koppers and Dosch-King both submitted bids to the state. This holding places the Second Circuit in direct conflict with a series of decisions of the Fifth Circuit holding that agreements to allocate territories between a manufacturer and its competing suppliers must be characterized as vertical rather than horizontal, and hence subject to rule of reason analysis, when the source of the agreement is the manufacturer. *Abadir & Co.* v. *First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981); *Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981); *H&B Equipment Co.* v. *International Harvester Co.*, 577

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[12] It is fundamental that a defendant in a criminal case is entitled to have the jury instructed on any theory of defense for which there is any foundation in the evidence, no matter how slight. *E.g.*, *United States* v. *Burkely*, 591 F.2d 903 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979); *United States* v. *Lewis*, 592 F.2d 1282 (5th Cir. 1979); *United States* v. *Burse*, 531 F.2d 1151 (2d Cir. 1976); *United States* v. *Hillsman*, 522 F.2d 454 (7th Cir. 1974), *cert. denied*, 423 U.S. 1035 (1975); *United States* v. *Blair*, 456 F.2d 514 (3d Cir. 1972). Failure to charge the jury on defendant's theory of the case is reversible error. *United States* v. *Davis*, 597 F.2d 1237 (9th Cir. 1979).

F.2d 239 (5th Cir. 1978); *In re Nissan Antitrust Litigation*, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

The Second Circuit has also placed itself in conflict with the First Circuit's holding that effectuation of a division of territories between a supplier and distributor by means of an ancillary agreement on price does not convert a rule of reason case into a *per se* one. *Eastern Scientific Co.* v. *Wild Heerbrugg Industries, Inc.*, 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 883 (1978). In contrast, the Court of Appeals below held that the challenged agreement was *per se* unlawful and not subject to rule of reason analysis as a vertical allocation of customers and territories because it involved, in part, an agreement on bid prices.

Clearly, the agreement on bid prices alleged here between a supplier, Koppers, and its distributor, Dosch-King, was ancillary to and a means of implementing the basic agreement to allocate territories. Thus, the central purpose of any such agreement is the division or allocation of markets[13] as the government conceded below, arguing that Dosch-King:

> agreed to the plan, subject to checking whether it would yield the result the parties had agreed to, *i.e.*, an approximately equal division of road tar sales, with Koppers low bidder in the east and Dosch-King low bidder in the west.

Moreover, every territorial allocation has an effect on prices since it leaves each retailer free to set its own price in its own territory without having to consider intrabrand competition from a retailer assigned to another

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[13] *See, e.g.*, *United States* v. *Azzarelli Construction Co.*, 612 F.2d 292, 294 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980); *United States* v. *David E. Thompson, Inc.*, 612 F.2d 1147, 1148 (1st Cir. 1980).

territory. The agreement challenged below, in fact, had a limiting effect on prices since Koppers' bid put a cap on the prices bid by Dosch-King.[14]

The District Court's charge precluded the jury from considering the actual competitive effects of the challenged conduct and determining whether or not it was reasonable. However, it was precisely because such

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[14] The other grounds by which the Court of Appeals upheld the *per se* instruction of the Court below are also unfounded. The Court of Appeals was incorrect in stating that there was no evidence that the challenged conduct was justified. Road tar was in intense competition with liquid asphalt which normally sold at a lower price. In 1969, when Koppers made its base road tar price generally available (thus allowing companies in addition to Dosch-King to submit road tar bids), Koppers lost sales to liquid asphalt. The evidence presented by the government's own witnesses established that Koppers was concerned that Dosch-King concentrate its marketing efforts in the western part of the state where Dosch-King had traditionally sold and where it was familiar with the customers and that Dosch-King lacked the sales force and distribution facilities to market road tar effectively in competition with asphalt in the eastern part of the state. In addition, it was conceded by all witnesses that distance was an important cost factor having a substantial impact upon an applicator's ability to compete. Dosch-King's distribution facilities were in the east. Thus, even a low bid by Dosch-King in the eastern part of the state might not result in a sale of road tar because of Dosch-King's inadequate sales and delivery capability, thus resulting in a loss of road tar sales to Dosch-King by Koppers.

Moreover, the Court of Appeals' holding is not justified by its assertion, unsupported by citation of authority, that the arrangement between Koppers and Dosch-King was fixed as horizontal in nature for all time because in 1967 Koppers was not Dosch-King's sole supplier of road tar even though Koppers had been Dosch-King's sole supplier for three years prior to the time of the acts for which Koppers was convicted. To adopt the rule announced by the Court of Appeals would be to allow Koppers to be convicted of a felony violation of the Sherman Act for a state of affairs that existed *only* when the Sherman Act carried misdemeanor penalties. A criminal conviction should only be permitted when all elements of the offense are committed within the relevant time period.

vertical restrictions have a "complex" market impact that the Supreme Court, in *Continental T.V. Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 51 (1977) held that such arrangements should be judged and submitted to juries under the rule of reason.

The Court should review this case to eliminate the conflicts between the decision of the Second Circuit and and the decisions of both this Court and the other circuits and to clarify the proper standards by which to judge the legality of agreements to allocate territories between manufacturers and distributors with whom they also compete.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 17, 1981

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

September Term 1980

No. 915

Argued: March 31, 1981 Decided: June 29, 1981

Docket No. 80-1362

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

KOPPERS COMPANY, INC.,
Defendant-Appellant.

Before FRIENDLY, MANSFIELD, *Circuit Judges,* and B. NEWMAN, *Judge.**

Appeal from a judgment of conviction of a felony violation of § 1 of the Sherman Act, 15 U.S.C. § 1, entered by the United States District Court for the District of Connecticut (Burns, J.) after a jury trial.

Affirmed.

JOHN BODNER, JR., Esq., Washington, DC (John DeQ. Briggs III, Esq., Robert J. Brookhiser, Esq., Howrey & Simon, Washington, DC; Ira B. Grudberg, Esq., David L. Belt, Esq., Susan H. Bartholomew, Esq., Jacobs, Jacobs & Grudberg, P.C., New Haven, CT; Barry J. Lipson, Esq., Pittsburgh, PA, of counsel), *for Appellant.*

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* Of the United States Court of International Trade, sitting by designation.

GEORGE EDELSTEIN, Attorney, Department of Justice, Washington, DC (Sanford M. Litvack, Assistant Attorney General, John J. Powers, III, Attorney, Department of Justice, Washington, DC; Gary Kimmelman, Jacqueline W. Distelman, Stuart Grabois, Attorneys, Department of Justice, New York, NY, of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge*:

Defendant, Koppers Company, Inc. ("Koppers"), appeals from a judgment of conviction entered on August 28, 1980, by Judge Ellen Bree Burns of the United States District Court for the District of Connecticut after a jury had found Koppers guilty of a felony violation of § 1 of the Sherman Act, 15 U.S.C. § 1.[1] The indictment under which Koppers was convicted charged that "[b]eginning sometime prior to January 1970 and continuing until at least March 1975" Koppers and Dosch-King Company, Inc. ("Dosch-King"), had engaged in a conspiracy to rig bids and allocate territories in the sale of road tar to the State of Connecticut and its subdivisions. Dosch-King pleaded *nolo contendere*, cooperated with the government, and was fined $40,000; Koppers stood trial, was convicted, and was fined $400,000.[2]

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[1] Title 15 U.S.C. § 1 reads as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

[2] Prior to December 21, 1974, violation of § 1 was a misdemeanor, 15 U.S.C. § 1 (1970); since then, it has been a felony

We affirm. Since the jury was justified in finding that Koppers' conspiratorial conduct constituted a *per se* violation of § 1 of the Sherman Act, there was no requirement that the jury go on to find that that conduct also resulted in an unreasonable restraint of trade.

In each year of the early 1970s the State of Connecticut solicited bids on an annual basis for the sale and application of road tar, a substance used to resurface and repair its secondary roads.[3] Any contracts eventually awarded for the purchase of road tar by the 169 towns and four state road maintenance districts in Connecticut had to be based on these bids. During the period covered by the indictment, Koppers and Dosch-King were the only participants in the road tar bidding. Koppers, a producer of road tar, had its plant in Kearney, N.J., and distributed its product in Connecticut from a storage facility in Portland, Connecticut, located in the eastern part of the state and owned by Mystic Bituminous Products Co. Dosch-King at all relevant times had its distribution points in Newton and New Haven, located in western Connecticut. Koppers produced all of the road tar which it sold in Connecticut. Prior to 1973 Dosch-King purchased most of its road tar from Reilly Tar and Chemical Corporation, occasionally making purchases from Koppers. Beginning in 1973, Dosch-King started buying all of its road tar from Koppers, and it

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punishable by fines of up to one million dollars. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708.

[3] During the period covered by the indictment, road tar was the substance which most towns preferred to use in repairing their roads, even though liquid asphalt, which could be used for the same purpose, was considerably cheaper. Since 1976, however, road tar has no longer been available in New England, because the dramatic increase in oil prices has made it more attractive for potential sellers of road tar to channel their product in other directions.

continued to do so throughout the remaining period of the indictment. Nevertheless, Dosch-King's bids at all times reflected transportation costs measured from its facilities in the eastern part of Connecticut.

Arthur Schuck, Koppers' manager of its eastern road materials district, made a proposal to Dosch-King in 1967 that the two firms divide the state between them so that Dosch-King would be the low bidder in the western part of Connecticut, where its activities were concentrated, and Koppers would be the low bidder in the eastern part, where its storage facility and distribution point were located. To accomplish this, Koppers would communicate its plant-side price and its estimated application cost to Dosch-King prior to the bidding deadline, so that both companies could use these confidential figures as the basis for their bids. Since the two firms were based at opposite ends of the state, the use of a common base price and application cost would have the effect of making each company the low bidder in its half of the state, because of the increasing transportation costs each would incur as they did on deliveries further and further from home. The companies would, however, continue to submit bids in all 169 Connecticut towns and all four maintenance districts, which would give the impression that they were in direct competition for the state's business even though they would know in advance which of their bids would be successful. After examining Schuck's proposal to make sure that it would in fact result in the approximately even division of the state's road tar business which Schuck had promised, Dosch-King agreed to the proposal.[4]

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[4] The companies also agreed to split up the four state maintenance districts. However, since the use of the transportation differential would not always divide the districts evenly, Schuck agreed to provide Dosch-King with Koppers' actual bid prices for the four districts, so that Dosch-King would bid high on the two eastern districts and low on the two western districts.

With minor variations not relevant here, the two parties followed the same basic pattern in making bids each year from 1968 to 1975. Each January Schuck would meet with Dosch-King officials to give them Koppers' plant-side base price and to assure them that Koppers was planning to adhere to the conspiracy. On the day before bids were due, Schuck would meet with Dosch-King personnel in Hartford. At these meetings, Schuck would give Dosch-King the bids which Koppers was going to make on the four maintenance districts, as well as the application rate which Koppers would be using in its town bids. With these figures in hand, Dosch-King was able to calculate exactly how much Koppers would be bidding in each town and maintenance district. In 1968, Dosch-King's bids were based on the formula worked out with Schuck. In later years Dosch-King simply calculated Koppers' bid for each town, and then adjusted its own bids so that it would win in the west and lose in the east. The result was that from 1968 through 1974 Koppers and Dosch-King succeeded in covertly dividing up the Connecticut road tar business on a roughly 50-50 basis.

In January, 1975, the companies once again submitted their bids in the normal manner but the State of Connecticut rejected them and called for a second round of bidding. When Dosch-King personnel contacted Schuck prior to the second round in order to get Koppers' base price, Schuck gave it to them, but informed them that the price would also be made available to the public. When Schuck was asked by Dosch-King whether this meant that "the deal we have had is over," he confirmed that it did. This second round of bidding, untainted by the Koppers/Dosch-King conspiracy, resulted in a notably different pattern of awards: Koppers ended up winning no awards at all, while Dosch-King's bids were somewhat lower than the ones it had submitted in January.

DISCUSSION

On this appeal Koppers' principal challenge is to the charge given by Judge Burns on the question of *per se* violations of the Sherman Act:

> "The Sherman Act is violated only by 'unreasonable' restraints of trade. Not all restraints of trade are unreasonable; however, certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on commerce and it is not necessary to consider why the acts were committed or what effect it had on the industry. Agreements among competitors to rig bids or allocate customers are such per se unreasonable restraints of trade and illegal.
>
> "In this case, members of the jury, if you find beyond a reasonable doubt that the defendant was a competitor of Dosch-King Company in the submission of bids to the State of Connecticut for road tar and became party to the conspiracy charged in the indictment, then you do not have to decide whether such conspiracy was reasonable or unreasonable because as I have just explained, an agreement among competitors to allocate customers and territories and not to compete for customers by submitting collusive bids is a per se violation of the Sherman Act."

Koppers argues that this charge improperly withdrew the question of reasonableness from the jury by the use of a conclusive presumption, namely, that bid rigging and customer allocation are unreasonable *per se*. This argument asks us in effect to overrule the Supreme Court's decisions in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972). We decline the invitation, not only because we lack the power but also

because the record here reveals the wisdom and applicability to this case of the *per se* rule established in those decisions.

In *Socony-Vacuum*, which was a criminal case, the Court held that an agreement among competitors to purchase surplus gasoline on the spot market in order to check the then current rapid decline in prices violated § 1 of the Sherman Act, 15 U.S.C. § 7, which, without using the term "unreasonable," declares unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." Although the Supreme Court had earlier interpreted this language as limited by the rule of reason, *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *American Tobacco Co.* v. *United States*, 221 U.S. 106 (1911), it concluded in *Socony-Vacuum* that certain types of conduct, including price-fixing, are so patently anticompetitive that they violate the Act without proof of unreasonableness in each case and accordingly held that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*," 310 U.S. at 223. The Court, applying the principle adopted by it in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927), explained the reasoning behind the *per se* rule:

> "Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competi-

tion; it would not be the charter of freedom which its framers intended.

> "The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system." 310 U.S. at 221.

Thus the Supreme Court declared what must automatically be treated as unreasonable within the meaning of its earlier judicially-created rule of reason. As Professor Bork has written:

> "Behavior is illegal *per se* when the plaintiff need prove only that it occurred in order to win his case, there being no other elements to the offense and no allowable defense." R. Bork, *The Antitrust Paradox* 18 (1978).

In *United States v. Topco Associates, Inc., supra,* the *per se* rule was held applicable to allocation of market territories between horizontal competitors in order to minimize competition between them, as occurred here between Koppers and Dosch-King from 1967 to 1973. The Court stated:

> "One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in

> contradistinction to combinations of persons at different levels of the market structure, *e.g.*, manufacturers and distributors, which are termed 'vertical' restraints. This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Such limitations are *per se* violations of the Sherman Act." 405 U.S. at 608.

In cases involving behavior such as bid rigging, which has been classified by courts as a *per se* violation, the Sherman Act will be read as simply saying: " 'An agreement among competitors to rig bids is illegal.' " *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979). Since the Sherman Act does not make "unreasonableness" part of the offense, it cannot be said that the judicially-created *per se* mechanism relieves the government of its duty of proving each element of a criminal offense under the Act. We note that every other circuit court which has confronted this issue has arrived at the same conclusion. *United States v. Society of Independent Gasoline Marketers*, 624 F.2d 461 (4th Cir. 1980), *cert. denied*, —— U.S. —— (1981); *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *United States v. Gillen*, 599 F.2d 541 (3d Cir.), *cert. denied*, 444 U.S. 866 (1979); *United States v. Brighton Building & Maintenance Co.*, *supra*.

Notwithstanding this settled law, which is rationally based and consistent with the language of the Act, Koppers argues that other Supreme Court decisions, *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Sandstrom v. Montana*, 442 U.S. 510 (1979), have in

effect put an end to criminal prosecutions for *per se* violations.[5] We disagree.

The decisions relied upon by Koppers are clearly distinguishable from *Socony-Vacuum* and the present case. *United States v. United States Gypsum Co., supra*, grew out of an indictment charging six major manufacturers of gypsum board with fixing prices by exchanging price information in violation of the Sherman Act. The defendants argued that their actions were undertaken for the purpose of complying with the "meeting competition" provision of the Robinson-Patman Act. 15 U.S.C. § 13. The jury was not required by the district court to find that the defendants intended to fix prices. The jury was simply instructed that it could convict the defendants if it found that " 'the *effect* of the exchanges of pricing information [had been] to raise, fix, maintain, and stabilize prices.' " *Id.* at 430 (emphasis supplied). The Supreme Court held that the instruction was erroneous, because it did not require the jury to find that the defendants, in exchanging the pricing information, had intended to fix prices. In reaching its decision, the Court was careful to note that proof of intent was necessary because the conduct in cases like *Gypsum* was "often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct" which the Court did not want to inhibit unduly. *Id.* at 441. The Court contrasted the conduct in *Gypsum* with "conduct regarded as *per se* illegal because of its unquestionably anticompetitive effects, see *e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)." *Id.* at 440. Thus the Court clearly indicated that if the jury had properly been instructed that to convict it must find an intent to fix prices the conviction would have been upheld without

[5] Koppers has made it clear, both in its briefs and at oral argument, that its argument is in no way meant to contest the validity of the *per se* rule in *civil* actions brought under the Sherman Act.

proof that the prices were unreasonable. Here Judge Burns did properly instruct the jury in unequivocal terms that an essential element of the crime was a conscious agreement between the defendants to submit collusive, rigged bids to Connecticut towns for sale and application of road tar, which meant that they must be found to have acted "voluntarily and intentionally." The evidence was undisputed that the defendants conspired to bid according to agreed-upon prices.

For the same reasons appellent's reliance on *Morissette v. United States*, *supra* (holding that intent is an essential element of the crime of embezzlement, 18 U.S.C. § 641, which must be charged to the jury) and *Sandstrom v. Montana*, *supra* (declaring erroneous, where intent was an essential element, an instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts") is misplaced. Here the jury was properly instructed that to convict it must find an intent to rig prices. Since an agreement to fix prices is by its very nature a restraint on competition within the meaning of § 1 of the Sherman Act and lacks "any redeeming virtue," *Northern Pacific Railway v. United States*, 356 U.S. 1, 5 (1958), there was no need for the government to prove that the prices fixed were unreasonable.[6] The

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[6] Koppers also argues that the district court's charge on intent, which permitted the jury to convict if it found that the defendant had known the objective of the conspiracy to rig bids and had intentionally become a member of it, was in conflict with *Gypsum*, because it did not require the jury to find that Koppers had also intended that the conspiracy result in anticompetitive effects. We reject this contention for the same reason that we reject Koppers' argument against the use of the *per se* rule in criminal cases. By allowing the jury to find criminal intent without addressing the issue of intent to unreasonably restrain trade, the district court was merely being consistent in its application of the *per se* rule to this case. Since the *per se* rule makes certain conspiracies illegal without regard to their actual effects on trade, it would be illogical to refuse to allow a jury to consider whether

government proved every fact necessary to constitute the crime alleged. *In re Winship*, 397 U.S. 358 (1970). Since we are persuaded that the behavior found to exist in this case fell into the *per se* category, we conclude that the district court did not err in not requiring the jury, once an agreement to rig prices was established, to find that the restraint on trade caused by the Koppers/Dosch-King conspiracy was unreasonable.

In addition to arguing that the charge given by the district court improperly withdrew the issue of reasonableness from the jury by the use of a conclusive presumption, Koppers also contends that the charge denied the jury the opportunity to find that the conspiracy in which Koppers was involved was not a horizontal conspiracy to rig bids or allocate customers but was instead a vertical allocation of territories or customers, which would properly be subject to the rule of reason. In making this argument, Koppers points to the fact that by 1973 Dosch-King was buying all of its road tar from Koppers, and that therefore their relationship was a vertical one, similar to the manufacturer-distributor relationship found to be subject to the rule of reason in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

The issue posed in the *Continental T.V.* case was whether a manufacturer's policy of limiting the number of franchises granted and requiring each franchisee to sell its products only from the location at which it was franchised constituted a *per se* violation of the Sherman Act. After noting that vertical restrictions of this type

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the defendant's acts had resulted in an unreasonable restraint, on the one hand, and then require it to find the specific intent to produce those effects, on the other. Where *per se* conduct is found, a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the *per se* rule is designed to avoid.

can often be expected to increase both intrabrand and interbrand competition, the Court concluded that a blanket *per se* rule applicable to all vertical restraints should not be laid down, because such restraints have not been shown to have the consistently "pernicious effect on competition" which previous decisions of the Court have required as a predicate for the imposition of a *per se* rule. *Id.* at 58. See *Northern Pacific Railway v. United* States, *supra.* The Court then went on to deal with the problem which may arise in classifying cases as vertical or horizontal in nature:

> "There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal *per se*, see, *e.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Topco Associates, Inc., supra*, but we do not regard the problems of proof as sufficiently great to justify a *per se* rule." 433 U.S. at 58 n.28.

There was no foundation in the evidence in this case to support Koppers' theory that its behavior was the sort that *Continental T.V.* sought to protect. The district court did not, therefore, err in refusing to give the requested charged based on *Continental T.V.* The decision in *Continental T.V.* not to impose a *per se* rule was based on the Court's determination that the kind of vertical restraint under consideration there held out at least some possibility of increased competition, both intrabrand and interbrand. No such possibility exists here. Koppers' obvious and only motive for maintaining Dosch-King as a supplier and bidder in Connecticut was not to promote competition but to raise prices and deceive state and local officials into the belief that Koppers and Dosch-King were bona fide competitors when in fact, as the evidence conclusively showed, they were not. The sole purpose of the

allocation was to enable Koppers and Dosch-King to fix higher prices while maintaining the pretense of price-based competition. For a relationship to qualify for rule-of-reason treatment under *Continental T.V.*, it is not enough that it be shown to be vertical; there must also be some "redeeming virtue," some possibility that the terms of the relationship hold out the prospect for being pro-competitive. Since the scheme entered into by Koppers and Dosch-King could not have had any effect except an anti-competitive one, *Northern Pacific Railway v. United States*, *supra*, 356 U.S. at 5, the rule laid down in *Continental T.V.* is not applicable.

The historical development of the relationship between Koppers and Dosch-King lends further support to the conclusion that a *per se* approach was properly applied below. The basic bid rigging agreement between Koppers and Dosch-King arrived at in late 1967 and early 1968 was clearly unlawful as a *per se* violation, since at that time the two firms were indisputably horizontal competitors. *United States v. Socony-Vacuum*, *supra; United States v. Topco Associates, Inc.*, *supra.* The terms of the agreement and the strategy for its implementation remained essentially unchanged from 1968 until the conspiracy's dissolution in 1975. While it is true that in 1973 Dosch-King began buying all of its road tar from Koppers, there is no evidence whatsoever that this change in supply patterns had any effect on the basic non-competitive relationship between the companies. The theme of *Continental T.V.* is that economic realities, including the possibility of pro-competitive activities, rather than legal formalisms should control. 433 U.S. at 46-47. In this case, in light of the total absence of evidence that any material aspect of the Koppers/Dosch-King became a purchaser of Koppers road tar, one must conclude that this technical change in the two companies' relationship had no legal significance in antitrust terms. As the Su-

preme Court pointed out in *Continental T.V.*, there is no doubt that "horizontal restrictions *originating in agreements among . . . retailers . . .* would be illegal *per se*." 433 U.S. at 58 n.28 (emphasis supplied). Since the conspiracy between Koppers and Dosch-King to rig bids originated as an agreement among competing retailers and was not automatically transformed into something different at the moment when its vertical elements, which always existed to some degree, became more prominent, we are convinced that it should be treated throughout as a *per se* violation of the Sherman Act. It is true that on two occasions during its charge the district court gave instructions to the effect that "[w]hat the Government must prove beyond a reasonable doubt is that the defendant knowingly entered into an agreement to rig bids *or* allocate customers or territories" (emphasis supplied). While in our view it would have been more nearly in the spirit of *Continental T.V.* to have made the charge in the conjunctive rather than the disjunctive, we do not consider this lapse to be material. In the first place, the district court went on to conclude its charge on the *per se* rule by making the following summary:

> "In this case, members of the jury, if you find beyond a reasonable doubt that the defendant was a competitor of Dosch-King Company in the submission of bids to the State of Connecticut for road tar and became party to the conspiracy charged in the indictment, then you do not have to decide whether such conspiracy was reasonable or unreasonable because as I have just explained, an agreement among competitors to allocate customers and territories *and* not to compete for customers by submitting collusive bids is a per se violation of the Sherman Act." (Emphasis supplied).

Thus, any confusion in the minds of the jury caused by the court's prior use of the disjunctive was cured. But

even if it was not, the court's use of the disjunctive not amount to reversible error in the context of this c We are not here dealing with a case where Kopp "allocation" of customers in the western part of the s to Dosch-King was a practice that could be treated separate and apart from the conspiracy to fix prices rigging bids and thus possibly found to be not unrea able within the purview of *Continental T.V.* Here the evidence with respect to the bid rigging and custo allocation practices on the part of Koppers and Do King was accepted by the jury as credible, as surely pears to have been the case, the two practices were i tricably intertwined. The court's instruction could therefore, have resulted in a conviction based on custo allocation *simpliciter.*

Koppers' remaining assignments of error may be posed of more briefly. We find no merit in its claim the district court supplied the jury with the wrong st ard for deciding when a company can be held crimin liable for the acts of its employees. The court cha that a corporation could be held criminally liable for acts of its managerial agents

> "done on behalf of and to the benefit of the corp tion and directly related to the performance of duties the employee has authority to perform. By a managerial agent I mean an officer of the poration or an agent of the corporation having du of such responsibility that his conduct may fairl assumed to represent the corporation."

Koppers would have us find that liability can only be tended to the action of "*high* managerial agents," m ing those "having duties of such responsibility [their] conduct may fairly be assumed to represent *policy of* the corporation" (emphasis supplied).

We decline the invitation. The standard for imp tion of liability given by the court below is amply

ported. See, e.g., *Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118, 127 (2d Cir. 1980), *cert. denied*, —— U.S.L.W. —— (1981); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). Nothing in the Supreme Court's decision in the *Gypsum* case altered this standard. Nor does the Model Penal Code Support Koppers' positions. In fact, on all issues relevant to this case the Code's suggested standard of imputed liability in antitrust cases is precisely the one followed by the district court. See Model Penal Code § 2.07(1)(a) (1962); *Developments in the Law—Corporate Crime*, 92 Harv. L. Rev. 1227, 1251-52 (1979). Finally, Koppers' assertion that in the area of punitive damages a stricter standard for imputation prevails is irrelevant. To recover punitive damages, a plaintiff must demonstrate that "the defendant has acted wantonly, or oppressively, or with . . . malice. . . ." *Lake Shore and Michigan Southern Railway v. Prentice*, 147 U.S. 101, 107 (1893). By contrast, even after *Gypsum* the intent element of a criminal antitrust violation does not include any finding of malice; nothing more is required than a showing that the defendant intentionally engaged in conduct that is a *per se* violation of the Sherman Act, which was proven here.

We also find no merit in the two evidentiary errors assigned by Koppers. The trial court's decision to admit evidence documenting the demise of the conspiracy between Koppers and Dosch-King and the subsequent change in bidding patterns was correct, since post-conspiracy evidence is admissible if it is probative of the existence of the conspiracy. *Anderson v. United States*, 417 U.S. 211, 221 (1974); *United States v. Tramunti*, 513 F2d 1087, 1115-16 (2d Cir.), *cert. denied*, 423 U.S.

832 (1975). In determining whether or not a conspiracy ever existed, the jury was entitled to hear testimony from one conspirator that he had been told by another conspirator that "the deal we have had is over"; the same is true of evidence showing that the bidding pattern for road tar in the first post-conspiracy competition differed significantly from the patterns observed during the life of the conspiracy. This evidence went directly to the question of whether or not a conspiracy ever existed; it therefore does not fall within the rubric of "subsequent remedial measures," Fed. R. Evid. 407, as urged by Koppers.

We also reject Koppers' argument that it was error for the district court to have permitted any reference to an investigation into road tar bid procedures undertaken in early 1975 by the State of Connecticut. The government's brief references to the report were made only to reveal to the jury the fact that the government's principal witnesses had perjured themselves during the early phases of the state investigation. In eliciting this testimony on direct, the government was acting within its right to anticipate attempts by defense counsel to attack its witnesses' credibility. See, e.g., *United States v. Hasenstab*, 575 F.2d 1035, 1040 (2d Cir.), *cert. denied*, 439 U.S. 827 (1978). In any case, it was defense counsel, not the prosecution, which dwelt at length on the existence of the state investigation. Under these circumstances, we are convinced no error occurred.

The conviction is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal N 79-85

UNITED STATES OF AMERICA,
Plaintiff

vs.

KOPPERS COMPANY, INC.,
Defendant

New Haven, Connecticut
June 26, 1980

BEFORE:

HON. ELLEN BREE BURNS, USDJ
And a Jury

JURY CHARGE

APPEARANCES:

FOR THE GOVERNMENT:

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350 Church Street
New Haven, Connecticut

• • • •

[38] In this case, the indictment alleges that the conspiracy was to restrain interstate trade or commerce in road tar.

The Sherman Act is violated only by "unreasonable" restraints of trade. Not all restraints of trade are unreasonable; however, certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restrain on commerce and it is not necessary to consider why the acts were committed or what effect it had on the industry. Agreements among competitors to rig bids or allocate customers are such per se unreasonable restraints of trade and illegal.

In this case, members of the jury, if you find beyond a reasonable doubt that the defendant was a competitor of Dosch-King Company in the submission of bids to the State of Connecticut for road tar and became party to the conspiracy charged in the indictment, then you do not have to decide whether such conspiracy was reasonable or unreasonable because as I have just explained, an [39] agreement among competitors to allocate customers and territories and not to compete for customers by submitting collusive bids is a per se violation of the Sherman Act. It is no defense to such a charge that the conspirators actually competed with each other in some ways or that the conspiracy was in fact unprofitable.

• • • •

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

September Term 1980

No. 915

Argued: March 31, 1981 Decided: June 29, 1981

Docket No. 80-1362

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

KOPPERS COMPANY, INC.,
Defendant-Appellant.

Before FRIENDLY, MANSFIELD, *Circuit Judges*, and B. NEWMAN, *Judge.**

Appeal from a judgment of conviction of a felony violation of § 1 of the Sherman Act, 15 U.S.C. § 1, entered by the United States District Court for the District of Connecticut (Burns, J.) after a jury trial.

Affirmed.

JOHN BODNER, JR., Esq., Washington, DC (John DeQ. Briggs III, Esq., Robert J. Brookhiser, Esq., Howrey & Simon, Washington, DC; Ira B. Grudberg, Esq., David L. Belt, Esq., Susan H. Bartholomew, Esq., Jacobs, Jacobs & Grudberg, P.C., New Haven, CT; Barry J. Lipson, Esq., Pittsburgh, PA, of counsel), *for Appellant.*

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* Of the United States Court of International Trade, sitting by designation.

GEORGE EDELSTEIN, Attorney, Department of Justice, Washington, DC (Sanford M. Litvack, Assistant Attorney, Department of Justice, Washington, DC; Gary Kimmelman, Jacqueline W. Distelman, Stuart Grabois, Attorneys, Department of Justice, New York, NY, of counsel), *for Appellee.*

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. N-79-85

(15 U.S.C. § 1)

UNITED STATES OF AMERICA,
Plaintiff,

v.

KOPPERS COMPANY, INC.; and
DOSCH-KING COMPANY, INC.,
Defendants.

Filed: 7/24/79

INDICTMENT

The Grand Jury charges:

I

DEFENDANTS

1. Koppers Company, Inc. ("Koppers") and Dosch-King Company, Inc. ("Dosch-King") are hereby indicted and made defendants herein.

2. Koppers is a corporation organized and existing under the laws of the State of Delaware with its corporate headquarters in Pittsburgh, Pennsylvania. During all or part of the period covered by this indictment, and within five years preceding the return hereof, it was

engaged in the business of selling road tar in the State of Connecticut.

3. Dosch-King is a corporation organized and existing under the laws of the State of New Jersey with its corporate headquarters in Whippany, New Jersey. During all or part of the period covered by this indictment, and within five years preceding the return hereof, it was engaged in the business of selling road tar in the State of Connecticut.

II

CO-CONSPIRATORS

4. Various persons, not made defendants herein, participated as co-conspirators in the offense charged and have performed acts and made statements in furtherance thereof.

III

TRADE AND COMMERCE

5. Road tar is refined from crude tar which is a by-product of the production of steel. It is used to resurface and repair roads and highways.

6. During the period covered by this indictment, the State of Connecticut provided funds, through its Town Aid Program ("TAP"), to its towns and municipalities ("towns") for the repair and resurfacing of the roads. Under this program, bids were solicited for the sale and application of road tar, as well as other paving materials, to town roads. In addition, bids were solicited for the sale and delivery of road tar, as well as for other paving materials, to the State of Connecticut for application by the State to roads and highways located in its four road maintenance districts.

7. During the period covered by this indictment, the defendants, Koppers and Dosch-King, were virtually the only firms which submitted road tar bids in response to the State of Connecticut's TAP bid solicitations. As a result, substantially all of the road tar purchased by the State of Connecticut and its towns through the TAP bid was sold by Koppers and Dosch-King. Their aggregate revenues, during this period, from the sale and application or delivery of road tar to the State of Connecticut and its towns were approximately $9 million.

8. During the period covered by this indictment, substantially all of the road tar sold by Koppers and Dosch-King to the State of Connecticut and its Towns was produced and refined in states other than the State of Connecticut. The road tar was shipped by barge from outside the State of Connecticut to storage facilities separately maintained by Koppers and Dosch-King within within the State of Connecticut, and after a brief period, delivered to the State of Connecticut or applied to its town roads. The road tar was not essentially altered or changed by Koppers ad Dosch-King prior to such delivery or application.

9. During the period covered by this indictment, substantial quantities of road tar were delivered in a continuous and uninterrupted flow of interstate commerce from outside the State of Connecticut, through Koppers and Dosch-King, to the State of Connecticut, and its towns. Koppers and Dosch-King acted as conduits through which substantial quantities of road tar were shipped and sold to the State of Connecticut and its towns in a continuous and uninterrupted flow of interstate commerce from its points of manufacture outside the State of Connecticut. During the period covered by this indictment, the shipment and sale of substantial quantities of road tar in interstate commerce was substantially affected by the combination and conspiracy charged in this indictment.

IV

OFFENSE CHARGED

10. Beginning sometime prior to January 1970 and continuing until at least March 1975, the exact dates being unknown to the grand jury, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

11. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) to submit collusive, non-competitive and rigged bids for the sale and application of road tar to town roads in the State of Connecticut;

(b) to submit collusive, non-competitive and rigged bids for the sale and delivery of road tar to the State of Connecticut for application to roads and highways in the State's four road maintenance districts;

(c) to allocate among themselves town and geographical areas for the sale and appliction or delivery of road tar; and

(d) to allocate among themselves road maintenance districts for the sale and delivery of road tar.

12. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do, including, among other things, communicating and exchanging bid information, at meetings and otherwise, prior to submitting bids pursuant to the TAP bid.

V

EFFECTS

13. The combination and conspiracy charged herein had the following effects, among others:

(a) price competition in the sale of road tar to the State of Connecticut and its towns has been restrained and eliminated;

(b) prices for the sale and application or delivery of road tar to the State of Connecticut and its towns have been fixed and rigged at artificial and noncompetitive levels; and

(c) the State of Connecticut and its towns have been deprived of the benefits of free and open competition in the sale of road tar for the repair and resurfacing of State and town roads and highways.

VI

JURISDICTION AND VENUE

14. The combination and conspiracy charged herein has been carried out, in part, within the District of Connecticut within five years preceding the return of this indictment.

Dated: July 24, 1979

A TRUE BILL

_____
Foreman

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JOHN H. SHENEFIELD
Assistant Attorney General

/s/ Joseph H. Widmar
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Opposition

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ALEXANDER
CL

No. 81-548

In the Supreme Court of the United States

OCTOBER TERM, 1981

KOPPERS COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

WILLIAM F. BAXTER
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QUESTIONS PRESENTED

1. Whether a jury in a criminal antitrust trial may be instructed that a conspiracy to rig bids and to allocate customers and territories is per se illegal under the Sherman Act.

2. Whether the court of appeals correctly concluded that petitioner's proposed jury instruction describing its conduct as a mere vertical allocation of territories had no foundation in the evidence presented to the jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-548

KOPPERS COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 652 F. 2d 290.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1981. On August 19, 1981, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 17, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 24, 1979, a grand jury sitting in Connecticut returned an indictment charging petitioner, Koppers Company, Inc., and Dosch-King Company, Inc., with conspiring to rig bids and allocate territories for the sale and

application of road tar to Connecticut towns, and for the sale and delivery of road tar to the State of Connecticut, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (Pet. App. 23a-28a). The indictment alleged that the conspiracy began prior to January 1970 and lasted until at least March 1975 (Pet. App. 26a). Dosch-King pled nolo contendere. Petitioner was convicted by the jury after a three-week trial and was fined $400,000 (Pet. App. 2a).

1. The facts of this case are fully described in the opinion of the court of appeals (Pet. App. 2a-5a). Briefly, during the relevant period, petitioner and Dosch-King Company both sold road tar within the State of Connecticut. In 1967, employees of both companies agreed to rig bids on town and state road projects in Connecticut (Pet. App. 3a-5a).[1] Under that agreement, each year petitioner provided Dosch-King with the actual amount of its bids on state projects and the formula it would use to calculate its bids on town projects, including its F.O.B. Portland, Connecticut price—a price not publicly available (Pet. App. 2a-5a). With this information, Dosch-King knew exactly what petitioner would bid on each project. Pursuant to their agreement, Dosch-King then would submit bids lower than those submitted by petitioner for projects in the western half of Connecticut (Pet. App. 4a-5a). It also would submit higher bids for projects in the eastern half of the State (*ibid.*).[2] At the time each bid was submitted, petitioner falsely declared "that the bid is not made in connection with any other bidder submitting a bid * * * and is in all respects fair and

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[1]Petitioner and Dosch-King were the only companies that submitted road tar bids within Connecticut during the period covered by the indictment (Pet. App. 3a).

[2]After the bids were announced, the two companies reviewed the bidding. On two occasions, petitioner's representative informed Dosch-King's agent that the latter had bid too close to petitioner and should increase the differential between the bids (App. 401-403). "App." refers to the appendix in the court of appeals. "GX" refers to the government's exhibits in the district court.

without collusion or fraud" (GX 10, at 2). The result of the conspiracy was, as the court of appeals noted, "that from 1968 through 1974 [petitioner] and Dosch-King succeeded in covertly dividing up the Connecticut road tar business on a roughly 50-50 basis" (Pet. App. 5a).

The conspiracy ended after the State of Connecticut rejected all bids in January 1975 and held a second bidding in April (Pet. App. 5a). When Dosch-King contacted petitioner for its F.O.B. price, petitioner supplied that information but stated that the F.O.B. price also would be made public. Dosch-King's representative then inquired whether " 'the deal we have had is over' " and received an affirmative reply (*ibid.*).

2. The court of appeals unanimously affirmed the jury's verdict (Pet. App. 1a-18a). Since petitioner did not challenge the sufficiency of the evidence, the primary issue on appeal was whether the district court had instructed the jury correctly concerning the application of the per se rule to the facts of this case (see Pet. App. 19a-20a).[3] The court initially observed that the instructions on the per se rule were a correct statement of this Court's decision in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (Pet. App. 6a-7a). Since the per se rule merely defines certain conduct such as price fixing to be illegal as a matter of law, the court noted that an instruction explaining the rule to the jury does not interfere with the jury's responsibility to determine whether the government proved every essential element of the offense (Pet. App. 8a-12a).

---

[3]Petitioner also challenged the district court's instruction on the liability of a corporation for the acts of its agents and the district court's admission into evidence of testimony concerning the circumstances under which the conspiracy ended (Pet. App. 16a-18a). The court of appeals correctly rejected both arguments and petitioner does not renew them in this Court.

The court also rejected petitioner's argument that it was entitled to an instruction on its theory that the bid-rigging scheme was a vertical territorial allocation that must be tested under the rule of reason. The court observed that the conspiracy enabled petitioner "to fix higher prices while maintaining the pretense of price-based competition" and thus "could not have had any effect except an anti-competitive one" (Pet. App. 14a). Moreover, the court noted that petitioner was a horizontal competitor of Dosch-King when the conspiracy began in 1967 and that even after it became Dosch-King's sole supplier of road tar in 1973, "[t]he terms of the agreement and the strategy for its implementation remained essentially unchanged * * *" until the conspiracy ended in 1975 (*ibid.*). Following a thorough review of the facts, the court held that "[t]here was no foundation in the evidence in this case" for the requested instruction (Pet. App. 13a).

ARGUMENT

The decision of the court of appeals, on which we rely, is correct and does not conflict with prior decisions of this Court or any other court of appeals. Accordingly, review by this Court is unwarranted.

1. Petitioner contends that unreasonableness is an element of a Sherman Act offense and that the per se rule improperly withdraws this factual issue from the jury's consideration. It thus argues that this Court's decision in *United States* v. *Socony-Vacuum Oil Co., supra*, which approved application of the per se rule in criminal cases, conflicts with subsequent decisions condemning jury instructions that rely on conclusive presumptions (Pet. 6-12). Contrary to petitioner's contention, there is no conflict between *Socony-Vacuum* and subsequent decisions of this Court.

Petitioner's argument is based on the erroneous premise that the per se rule withdraws a *factual* element from the jury's consideration. In fact, every court of appeals that has

considered this question has rejected that argument.[4] As these courts have noted, the per se rule does not create an evidentiary presumption that requires the fact-finder to presume an essential fact from proof of another fact. Rather, the per se rule is a substantive principle of law that defines the element of the criminal offense. See *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396-398 (1927); see also *id.* at 400 ("any agreement for price-fixing, if found, would have been illegal as a matter of law"). It reflects an authoritative interpretation of the Sherman Act by this Court which Congress has never disturbed. Under this interpretation, certain types of conspiracies are illegal as a matter of law just as if Congress had expressly denounced them in the Sherman Act.

When the conspiracy at issue is subject to the per se rule, the factual question for the jury to resolve is whether the defendant knowingly and intentionally engaged in that conspiracy.[5] The per se rule does not relieve the government of this burden of proof. But because such a conspiracy is illegal as a matter of law, once the jury resolves that factual issue

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[4] *United States* v. *Manufacturers' Association of the Relocatable Building Industry*, 462 F. 2d 49 (9th Cir. 1972); *United States* v. *Society of Independent Gasoline Marketers*, 624 F. 2d 461, 464-465 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Brighton Building & Maintenance Co.*, 598 F. 2d 1101, 1106 (7th Cir.), cert. denied, 444 U.S. 840 (1979); *United States* v. *Gillen*, 599 F. 2d 541, 544-545 (3d Cir.), cert. denied, 444 U.S. 866 (1979); *United States* v. *Continental Group, Inc.*, 603 F. 2d 444, 460-466 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Cargo Service Stations, Inc.*, 657 F. 2d 676 (5th Cir. 1981).

[5] "Behavior is illegal per se when the plaintiff need prove only that it occurred in order to win his case, there being no other elements to the offense and no allowable defense." R. Bork, *The Antitrust Paradox* 18 (1978).

adversely to the defendant no further proof of anticompetitive effect is required. *United States* v. *Socony-Vacuum Oil Co., supra.*[6]

Since the per se rule is a rule of law that does not foreclose the jury from determining the essential elements of the offense, there is no conflict between this Court's decision in *Socony-Vacuum* and the subsequent decisions relied on by petitioner (see Pet. App. 10a-12a). Indeed, this Court previously has declined to review cases in which similar arguments were advanced (*United States* v. *Continental Group, Inc.*, 603 F. 2d 444 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); *United States* v. *Brighton Building & Maintenance Co.*, 598 F. 2d 1101 (7th Cir.), cert. denied, 444 U.S. 840 (1979)) and there is no reason for a different result in this case.

2. Petitioner also argues that an instruction on the per se rule was erroneous in this case because petitioner merely entered into a vertical relationship with its customer which, under this Court's decision in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), should have been judged under the rule of reason (Pet. 13-17).

As both the district court and the court of appeals found (Pet. App. 13a), however, there is no factual basis in the record for petitioner's argument. Petitioner was a horizontal competitor of Dosch-King at the time the conspiracy began in 1967. At that time, Dosch-King obtained substantially all of its road tar from another company (Pet. App. 3a). Indeed, petitioner did not become its sole supplier until

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[6]Indeed, this Court noted in *Socony-Vacuum* that even a conspiracy that completely fails to achieve its goal violates the Sherman Act. 310 U.S. at 225 n.59. Such a conspiracy obviously would have no anticompetitive effects. Yet, it is still illegal per se.

1973, just two years before the State of Connecticut uncovered the conspiracy (Pet. App. 3a, 14a). Even after 1973, the conspiratorial agreement remained the same (Pet. App. 5a, 14a-15a).[7] Petitioner would disclose its bids in advance to Dosch-King so that Dosch-King could bid either over or under them as their agreement dictated (Pet. App. 5a, 14a). Thus, the conspiracy originated as an agreement between competing retailers and even after petitioner became Dosch-King's supplier, petitioner fraudulently held itself out as a competitor in the submission of bids to the State and various towns in Connecticut.

On these facts, the court of appeals properly rejected petitioner's argument that its relationship with Dosch-King was purely vertical in nature.[8] There is no need for this Court to review that factual determination, which is of importance only in this particular case. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 46 n.7 (1979).

---

[7]A line was dropped from the court of appeals' opinion (Pet. App. 14a) when the appendix to the petition was printed. The court of appeals' opinion, correctly reproduced, states the following: "In this case, in light of the total absence of evidence that any material aspect of the Koppers/Dosch-King anti-competitive relationship was altered when Dosch-King became a purchaser of Koppers road tar, one must conclude that this technical change in the two companies' relationship had no legal significance in antitrust terms." 652 F. 2d at 297.

[8]For this reason, there is no merit to petitioner's contention that the decision in this case conflicts with decisions of other circuits holding that agreements between a manufacturer and its competing supplier to allocate territories should be judged under the rule of reason. The court simply held that "[t]here was no foundation in the evidence in this case" to support the vertical relationship theory that petitioner advanced (Pet. App. 13a). The court did not suggest that such a relationship, if it had existed, would be illegal per se. Thus, there is no conflict between this case and the cases relied on by petitioner (Pet. 14-15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1981

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Petitioner's Reply Brief

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No. 81-548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

KOPPERS COMPANY, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-548

KOPPERS COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

Respondent's Opposition Brief obscures rather than addresses the legal issues presented for review by this Court.

The Petition herein presents two important issues for review. First, it challenges the Court of Appeals' ruling that a jury in a criminal antitrust case may be instructed that certain types of conduct are conclusively presumed to be *per se* unreasonable under the Sherman Act. That ruling directly conflicts with recent decisions of this Court that it is impermissible in a criminal case to use a conclusive presumption to withdraw an essential element of a crime from the consideration of the jury. Second, the Petition challenges the Court of Appeals' ruling that an agreement to allocate territories between a supplier and

its competing distributor must be characterized as a horizontal agreement subject to a presumption of *per se* illegality. That ruling conflicts with the decisions of this Court as well as those of several Courts of Appeals that such an agreement should be judged by the trier of fact under the rule of reason standard. That ruling also improperly withdrew from the consideration of the jury the crucial question of whether the challenged conduct was, in fact, horizontal or vertical in nature.

Respondent's answer seeks to avoid the first conflict by denying that *per se* determinations of unreasonableness in antitrust cases are conclusive presumptions. It seeks to avoid the second conflict by mischaracterizing the Court of Appeals' ruling as a factual one dealing with a unique situation.

I. Per Se Characterizations Are Conclusive Presumptions of Unreasonableness

Respondent acknowledges, as it must, that this Court has repeatedly held that a trial court may not withdraw any necessary element of a crime from the jury by the use of a conclusive presumption.[1] Respondent seeks to gloss over the force of these decisions by characterizing the *per se* tests of unreasonableness under the antitrust laws as "substantive rules of law" rather than conclusive presumptions. Thus, respondent states that the Sherman Act must be read as if it said that "certain types of [agreements] are illegal as a matter of law just as if Congress had expressly denounced them in the Sherman Act." (Brief in Opp. at 5.)

The basic flaw in respondent's argument is that this Court has repeatedly described *per se* categorizations of unreasonable conduct as conclusive presumptions. *E.g.*

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[1] *Morissette* v. *United States*, 342 U.S. 246 (1952); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978).

Broadcast Music, Inc. v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979).[2] Respondent's claim that judicially developed categories of conduct are substantive rules of law is simply another way of saying that courts may judicially legislate criminal conduct, which they plainly cannot do.

Respondent is also wrong when it says that the use of *per se* categories does not involve the presumption of any factual element of a Sherman Act offense. Since unreasonableness is an essential element of a Sherman Act violation,[3] the use of judicially developed *per se* categories is nothing more than a way of proving through the use of a conclusive presumption that a restraint which falls into one of them is, in fact, unreasonable, without examining the actual effects of the particular agreement at issue. The essential fact presumed is that a particular

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[2] *See also* cases cited in Petition, at 6-7, as well as *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 399 (1927), *quoting Standard Oil Co.* v. *United States*, 221 U.S. 1, 65 (1911), the very case relied upon by the government.

The cases upon which respondent relies are not authority for the contrary. With one exception, each of the lower court cases cited by the respondent deals with the question whether *intent* is an element of a *per se* offense, whereas this petition raises the question whether *unreasonableness* is an element of any antitrust offense.

The remaining case, *United States* v. *Manufacturers' Ass'n of the Relocatable Building Industry*, 462 F.2d 49 (9th Cir. 1972), offers no rationale for its conclusory statement and, in any event, pre-dates this Court's opinions in *Gypsum* and *Sandstrom*, which hold that conclusive presumptions which remove an essential element of a crime from the considerations of the jury are inappropriate in criminal cases.

[3] *See United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at 396 ("only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law . . ."); *see also Moraine Products* v. *ICI America, Inc.*, 538 F.2d 134, 146 (7th Cir.), *cert. denied*, 429 U.S. 941 (1976) ("only unreasonable restraints of trade or commerce are within the prohibition of the Sherman Act").

type of agreement is an unreasonable restraint of trade. *See, e.g., Carter-Wallace, Inc.* v. *United States*, 449 F.2d 1374, 1381 (Ct. Cl. 1971).

This case demonstrates the operation of *per se* categories as conclusive presumptions of the fact of unreasonableness. The indictment charged Koppers with engaging in a combination "in *unreasonable* restraint" of trade. The Court's instructions charged the jury to find that an agreement between Koppers and Dosch-King to rig bids or allocate territories was "*per se* unreasonable." Thus, the element of the unreasonableness of such an agreement was removed from the jury's consideration.[4] The conflict with this Court's decisions in *Morissette*, *Gypsum* and *Sandstrom* is clear.[5]

II. The Trial Court's Instruction Precluded The Jury From Determining Whether The Challenged Agreement Should Be Judged Under The Rule of Reason

There is no dispute that this case involves a challenged agreement to allocate territories between a supplier and a distributor with whom it also competed. Notwithstanding the undeniable vertical aspects of this relationship, the trial court's charge instructed the jury that the challenged agreement must be regarded as purely horizontal, and thus *per se* unreasonable. As a result, the jury was precluded from determining whether, considering all of the facts, the agreement was vertical in nature

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[4] The use of such a conclusive presumption of unreasonableness is particularly inappropriate here where the agreement in question is between a supplier and a competing distributor and thus does not clearly fall within any of the traditional *per se* categories involving conduct solely between competitors.

[5] Contrary to respondent's suggestion, neither *United States* v. *Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980), nor *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101 (7th Cir), *cert. denied*, 444 U.S. 840 (1979), raised this issue. Each case dealt with the issue of intent.

and thus subject to the rule of reason, as Koppers contended.[6]

Respondent argues that the Court of Appeals' characterization of the agreement as purely horizontal is correct as a matter of fact. However, this does not alter the fact that the District Court withdrew from the jury the basic factual question of whether the agreement was horizontal or vertical. When, as here, a challenged arrangement has obvious and undeniable vertical elements, this Court and other Courts of Appeal have repeatedly held that such agreements are not conclusively presumed unreasonable, but must be submitted to the trier of fact (in this case, the jury) to be judged under the rule of reason standard.

Subsequent to the filing of this Petition, a different panel of the Court of Appeals for the Second Circuit reached the same conclusion. In *Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, 1981 Trade Cas. ¶ 64,343 (2d Cir. 1981), the court[7] recognized the existence of a conflict among the Circuits, as the Petition points out, and held that "there is an insufficient history of rule of reason cases upon which to base an expansion of [the] *per se* rule to include all suppliers who also compete with their distributors . . . ." *Id.* at 74,592. Moreover, this Court has recently denied petitions for writs of certiorari to review the decisions of the Courts of Appeals for the Fourth and Fifth Circuits that territorial restraints in dual distribution systems are to be judged by the trier of fact under the rule of reason. *See Red Diamond Supply, Inc.* v. *Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir.)

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[6] As pointed out in the Petition (p. 14, n.12), a defendant in a criminal case is entitled to have the jury instructed on any theory of defense for which there is any foundation in the evidence, no matter how slight.

[7] The panel consisted of Circuit Judges Oakes and Meskill, and District Judge Blumenthal. The panel in this case consisted of Circuit Judges Mansfield and Friendly, and Judge Newman of the Court of International Trade.

(Gee, Wisdom, & Ainsworth, JJ.), *cert. denied*, 50 U.S. L.W. 3222 (U.S. Sup. Ct. 1981); *Donald B. Rice Tire Co.* v. *Michelin Corp.*, 638 F.2d 15 (4th Cir.) (Haynesworth, Bryan, & Phillips, JJ.), *cert. denied*, 50 U.S. L.W. 3219 (U.S. Sup. Ct. 1981).

CONCLUSION

In view of the increasing frequency of criminal antitrust actions brought by the Department of Justice, the impropriety of treating defendants in criminal antitrust cases differently than defendants in other criminal cases, and the importance of dual distribution systems in our national economy, resolution of these two issues is of central importance to the proper administration of the Sherman Act as a criminal statute. Accordingly, the Petition should be granted.

Respectfully submitted,

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